MASKIMI SDN BHD

v.

LEE POH HENG

HIGH COURT MALAYA, KUALA LUMPUR
KL REKHRAJ J
[CIVIL SUIT NO: D6-22-803-1999]
10 JULY 2000

CIVIL PROCEDURE: *Default judgment - Setting aside - Defendant's solicitors informed plaintiff's solicitors of instructions to accept service of process - Writ served on defendant personally - Whether breach of r. 56 of Legal Profession (Practice & Etiquette) Rules 1978 - Whether judgment irregular - Whether defence had merits - Whether judgment should be set aside*

The plaintiff purchased shares in a particular company from the defendant. Under the sale and purchase agreement, there was a clause stating that the said company would achieve certain minimum profits for a period of three years. There was another clause stating that in the event the company did not achieve the said minimum profits, the defendant shall pay to the plaintiff the difference between the actual profits and the projected profits. The company suffered losses for the period in question. The plaintiff's solicitors wrote to the defendant demanding the difference between the actual profits and the projected profits. The defendant's solicitors responded by disputing the claim and informing the plaintiff's solicitors that they had instructions to accept service of process in the event the plaintiff intended to commence proceedings. The plaintiff proceeded to issue a writ but served the same on the defendant personally. As no further action was taken by the defendant, the plaintiff entered judgment in default. Subsequently, the defendant filed a summons-in-chambers praying that the service of the plaintiff's writ be set aside and with it the judgment in default, or that he be granted leave to apply out of time to have the said judgment set aside.

Held:

[1] Rule 56 of the Legal Profession (Practice & Etiquette) Rules 1978 provides that "where … the fact of representation is known to the other party, no advocate and solicitor representing the other party to the proceedings shall enter judgment by default against the client of the advocate and solicitor … unless he shall have given to such named advocate and solicitor written notice of his intention to do so; and (7)

days shall have elapsed after the delivery of such notice to the named advocate and solicitor." However, this is a rule regulating personal relationships in the legal profession and is not a substantive rule of law to be complied with as if it were a rule under the Rules of the High Court 1980. Any breach thereof is a cause of reference to the disciplinary board of the Bar Council.

[2] A breach of the Legal Profession (Practice & Etiquette) Rules 1978 by itself does not in anyway render a judgment irregular. In the instant case, service was properly and personally effected on the defendant who acknowledged receipt thereof. His failure to enter appearance warranted the entering of a default judgment and such judgment was regularly obtained. A regularly obtained default judgment can only be set aside at the discretion of the court if there appears to be a defence showing merits.

[2a] There was no ambiguity in the material clauses. The defendant warranted that in the event the profits were less than the projected profits, he shall pay to the plaintiff the difference between the profits made by the company and the projected profits. Thus, the defendant had failed to establish a defence on the merits.

[Order accordingly.]

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Bank Bumiputra Malaysia Bhd [1988] 1 MLJ 33 ***(refd)***

Bank Bumiputra Malaysia Bhd. v. Majlis Amanah Rakyat [1979] 1 MLJ 23 ***(refd)***

Fira Development Sdn Bhd v. Goldwin Sdn Bhd [1989] 1 CLJ 1 ***(refd)***

Hasil Bumi Perumahan Sdn Bhd & Ors v. United Malayan Banking Corp Bhd [1994] 1 CLJ 329 ***(refd)***

Legislation referred to:

Legal Profession (Practice & Etiquette) Rules 1978, r. 56

Rules of the High Court 1980, O. 10 r. 1, O. 33

For the appellant - HM Ooi; M/s Logan Sabapathy & Co

For the defendant - Yusman Badar; M/s Amir Faezal Norzela & Chong

Reported by S Dharmendran

JUDGMENT

KL Rekhraj J:

Pursuant to the sale and purchase agreement dated 7 August 1995; and entered into between the plaintiffs; as the purchasers on the one part; and the defendant as the vendor on the other part (hereinafter called the sale and purchase agreement) wherein the vendor as the owner and as beneficial owner agreed to sell 1,530,000 shares held by him in Hamsay Glass Sdn. Bhd. (company) at a purchase consideration of RM6,340,000 (purchase price) upon terms and conditions as provided therein - *inter alia*, under cl. 8.2.3 upon a warranty representation of the defendant (vendor), that the company shall have a **minimum profits** for a period of three years effective 30 June 1997 as follows:

(a) for the year ending 1997 RM2 million;

(b) for the year ending 1998 RM2 million; and

(c) for the year ending 1999 RM2 million.

Further by **cl. 8.3** of the agreement, the defendant undertook to indemnify and keep indemnified the purchasers against all losses arising out of all or any breach of warranties, undertakings or covenants and or misrepresentations. In addition to the above, the defendant also by **cl. 8.9** of the said agreement warranted "the vendor further warrants and undertakes that in the event the **minimum profits of the company for the period of three years from the date of this agreement** (dated 7 August 1995) is less than as provided for in cl. 8.2.3 (hereinabove) - then the vendor shall pay to the purchaser the difference between the profits made by the company for the three year period; the amount specified in cl. 8.2.3.; and which amount by way of **payment shall be made by the vendor** to the purchaser **at such time as the purchaser may at its absolute discretion determine** (or make)."

The company suffered losses for the period of three years from the date of the agreement as provided for under cl. 8.9; and the plaintiffs therefore claimed against the defendant in the sum of RM5,225,147 being the losses suffered worked up as at 30 June 1998, together with interest thereon and costs.

The plaintiffs (before the issuance of the writ dated 24 March 1999) had on 4 November 1998, through their previous solicitors had written to the defendant of the breach on the part of the defendant and demanding of the defendant the said sum of RM5,225,147 to be paid within 14 days of the date thereof failing which legal proceedings shall be instituted against him.

To this demand, the defendants solicitors M/s Amir, Faezal, Norzela & Chong by their letter dated 10 November 1998, replied -

(a) our client disputes the claim as specified in your letter; and

(b) we wish to inform that should your client intend to commence any proceedings in this matter, we have instructions to accept service of process.

The plaintiffs proceeded to issue the writ; and instead of having it served on the solicitors as requested for in the letter of M/s Amir, Faezal, Norzela & Chong, served it personally on the defendant on 6 April 1999, in accordance with O. 10 r. 1 of the Rules of the High Court, 1980; and upon the default of appearance by the defendant, and upon perusal of the affidavit of service of the writ of summons of claim and the certificate of non-appearance having been filed; and the court being satisfied that the plaintiffs' claim was a liquidated sum, entitling judgment in default, the court entered judgment on 20 April 1999, against the defendant; thereby making it a **regularly obtained judgment**; and a regularly obtained judgment can only be set aside upon an application, provided the affidavit in support of the summons to set aside shows that the defendant has a valid defence on merits.

After the entering of the judgment, the defendant then attempted to enter an **unconditional appearance**, and by this act of unconditional appearance had elected to waive the argument of any on irregularity in the service. The defendant then filed a summons in chambers on 25 June 1999, praying for:

(i) That the service of the plaintiffs writ of summons on the defendant be set aside and with it the Judgment in default entered on 20th April 1999; and

(ii) in the alternatively, the defendant be granted leave to apply out of time to have the said Judgment set aside;

In the defendants written submissions, the defendant took the issue:

(a) whether the said judgment was entered irregularly; and if so, then the application to set aside was to be granted *ex-debito justitiae*; and

(b) but if the judgment so entered was a regular judgment, then whether the defendant has set out sufficient evidence before the court to show that he had a *prima facie* defence on the merits to the plaintiffs claim.

The defendants submission on irregularity of judgment was a non-starter, as **the test** as to whether a judgment in default has been regularly obtained has been laid out in the Supreme Court decision in the case of *Fira Development Sdn. Bhd. v. Goldwin Sdn. Bhd.* [1989] 1 MLJ p. 40 at p. 41, where His Lordship Lee Hun Hoe (CJ) stated -

> where the judgment is entered on the failure of the defendant to take any of the procedural steps laid down under the Rules of the High Court, 1980, the court has an absolute discretion to set aside the judgment by adopting the ratio of Lord Atkins in *Evans v. Bartlam* (1937) AC 473 that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke ... where that has only been obtained by failure to follow any of the rules of procedure.

It is clear that the defendants contention of irregularity hinges on the only contention that the plaintiffs then solicitors had breached r. 56 of the Legal Profession (Practice & Etiquette) Rules 1978 which reads:

> where the name of the advocate and solicitor or his firm appears on the Court record or the fact of representation is known to the other party, no advocate or solicitor representing the other party to the proceedings shall enter judgment by default against the client of the advocate and solicitor ... unless he shall have given to such named advocate and solicitor written notice of his intention to do so; and (7) days shall have elapsed after the delivery of such notice to the named advocate and solicitor.

To me r. 56 is a rule to regulate the personal relationship in the legal profession as said by His Lordship Zakaria Yatim J. (as he then was in the case of *Asia Commercial Finance (M) Bhd. v. Bank Bumiputra Malaysia Bhd.* [1988] 1 MLJ 33; and is not a substantive rule of law to be complied under the Rules of the High Court; and any breach thereof, if any, is a cause of reference to the disciplinary board of the bar council.

Breach by itself does not in anyway render the judgment as irregular. In the case, service was properly and personally effected on the defendant who acknowledged receipt thereof; and his failure to enter appearance (or where the writ is not properly served, but enters an unconditional appearance in the action; the writ then shall be deemed to have been duly served on him) warrants the entering of default judgment, as having been regularly obtained; and a regularly obtained judgment can only be set aside at the discretion of the court if there appears to be a defence showing merits.

The **test** to be applied as to whether the judgment in default is regularly entered is set out as per His Lordship Raja Azlan Shah CJ. Malaya, as he then was, (present His Royal Highness) in the case of *Bank Bumiputra Malaysia Bhd. v. Majlis Amanah Rakyat* [1979] 1 MLJ p. 23 as:

> The Rule gives the Court a discretion to be exercised Judicially. It is axiomatic that if the judgment is regular, then it is an inflexible rule that there must be an affidavit of merits, that is, an affidavit stating facts showing a defence on the merits.

Again His Lordship Jemuri Serjan CJ (Sabah) in the Supreme Court decision of *Hasil Bumi Perumahan Sdn. Bhd. & Ors. v. United Malayan Banking Corp. Bhd.* [1994] 1 MLJ 132 said -

> To use common and plain language, the application must show that his defence is not a sham defence, but one that is *prima facie,* raising serious issues as a *bona fide* reasonable defence... . It involves a mental process that goes through the mind of the judge, when making a decision in any case, weighing the evidence of the litigant against that of another on the facts alleged.

With these propositions on record, the question now begs to be asked is - Has the defendant shown a defence on the merits in his affidavit? The gist of the defendants purported defence is contained in paras. 21 to 24 of the defendant's affidavit in largely trying at its best to interpret cl. 8.2.3 and 8.9 of the sale and purchase agreement, in a manner to import that the plaintiffs claim was premature to crystalise only on 30 June 2000; and by an innuendo, suggesting that the profits represented could not be targeted by reasons of his having been removed as a director of the company, in which he held shares and sold to the plaintiffs; and that the result of his removal from the company has prejudiced him as a party to the agreement, and submitting that the interpretation of the cl. 8.2.3 and cl. 8.9 be interpreted restrictively to read that the plaintiffs claim was to mature only after 30 June 1999.

The plaintiffs on the other hand submitted that the words used in the document (sale and purchase agreement cl. 8.2.3, cl. 8.3 read together with cl. 8.9) must be construed in their ordinary and natural meaning as being without any ambiguity. **In otherwords** the meaning of the words used in the document if read as a whole, conveys the one and the only intent, without any ambiguity, and it is not for the judges to invent or read fancies or ambiguities, as an excuse to put the matter for trial; instead be brave enough to attack that issue summarily and decide that as a point of law under O. 33(2) of the Rules of the High Court 1980.

Having read the clauses in the context, there clearly appears to be no ambiguity at all, the meaning is clear, the defendant, (vendor) warranting and undertaking that in the event of the profits being less than the minimum profits for a period of three (3) years from the date of the agreement dated 7 August 1995; the vendor shall pay to the purchaser the difference between the profits made by the company for the three (3) year period, and which payments shall be made by the defendant at the absolute discretion and at such time of the **demand of the purchaser**. There is no evidence produced to the court by the defendant in rebuttal that profits, if any, have been made, except to traverse that the profits could not be realised; for reasons of his having been removed from the company as a managing director on or about the 14 October 1998.

Reading the sale and purchase agreement, no where was it provided or reserved by the defendant that the minimum profit formula was solely dependent upon the defendant remaining or continue to remain as the managing director of the company.

The plaintiffs claim herein is for the monies due for the period expiring 30 June 1998, whilst the defendant as a managing director was only removed on 14 October 1998, and therefore the plaintiffs claim is well within the period of the defendants representations, warranties and indemnities.

Taking all these factors into consideration, the defendant had failed to establish the test of defence on merits. I accordingly allowed the appeal on that part of the order of the senior assistant registrar that there was an issue of a defence on merit.

I am satisfied that the defendant has no defence at all on merits. I also awarded costs of RM2,000 to the plaintiffs.